

NATIONAL LABOR RELATIONS BOARD

NLRB v. TITO CONTRACTORS, INC.	847 F.3d 724 (D.C. Cir. Feb. 3, 2017) <i>remanding</i> 362 NLRB No. 119 (2015), Board Case No. 05-CA-149046
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TITO CONTRACTORS, INC.'S POSITION STATEMENT

Tito Contractors, Inc. (“Tito”), by and through undersigned counsel, submits this position statement in response to the April 19, 2017 letter from the Board regarding the Court of Appeals’ decision and remand. Consistent with the Court of Appeals’ decision, Tito believes that the Union’s petition for representation should be dismissed as the bargaining unit it seeks is not appropriate. Furthermore, since the February / March 2014 mail-ballot election, circumstances at Tito have changed significantly, such that the record developed at the December 2013 hearing no longer accurately reflects Tito’s operations or workforce. Accordingly, we ask that the case be dismissed or, alternatively, remanded to the Regional Director for further proceedings.

The Bargaining Unit Sought by the Union is Inappropriate

Although the Court remanded the case to the Board for further proceedings, its decision clearly indicates that a wall-to-wall bargaining unit is not appropriate. The Court held that “the Board did not adequately consider the ample evidence manifesting that Tito’s employees lacked a community of interest.” *Tito*, 847 F.3d at 732. In describing Tito’s offer of proof, the Court found that it “plainly showed no community of interest.” *Id.* at 733. The Court pointed to three types of evidence that contradicted the Board’s conclusion: (1) evidence that Tito’s business was comprised of two discrete halves; (2) evidence regarding a lack of interchange among employees; and (3) evidence regarding the “significant differences” among employees’ wages, hours and other

working conditions. *Id.* This evidence, as explained in more detail in Tito's previous filings with the Board and its appellate brief, demonstrate that the employees within the proposed bargaining unit do not share a community of interests. As noted in the Board's November 17, 2014 decision, there was "no evidence of collective bargaining in smaller units and no party seeks to represent any of the employees in a smaller unit." Accordingly, the case should be dismissed.

Tito's Operations and Workforce Have Changed Significantly

Since the December 2013 hearing regarding the Union's petition for representation, Tito's business operations have changed significantly. Under the circumstances, it would be improper to issue an order affirming the appropriateness of the bargaining unit. Moreover, the record that was created at the December 2013 hearing no longer accurately reflects Tito's operations.

Where a proposed bargaining unit is modified post-election and "is fundamentally different in scope or character from the proposed bargaining unit," the Board may set aside the election results. *NLRB v. Beverly Health & Rehabilitation Servs.*, Case No. 96-2195, 1997 U.S. App. LEXIS 21257, at * 10-12 (4th Cir. Aug. 12, 1997). This practice protects the fundamental right of the employees to make an informed choice in a representation election. *Id.*; *see also Hamilton Test Sys., Inc. v. NLRB*, 743 F.2d 136, 141 (2d Cir. 1984). "In determining whether an employee's freedom to make an informed choice has been compromised by the subsequent modification of the bargaining unit for which he voted, we consider several factors: (1) the difference in size between the bargaining unit proposed to the employees before the election and the final size of the unit; (2) the character and scope of the pre-and postelection units; and (3) the closeness of the election results." *Beverly Health & Rehabilitation Servs.*, at * 11.

The Union's November 2013 representation petition sought a wall-to-wall unit of employees, excluding project managers, recycling supervisors, clerical employees, managerial employees, professional employees, guards and supervisors. The proposed unit consisted of both recycling employees and laborers. The Court's appellate decision recounts the details provided in Tito's offer of proof. *See Tito*, 847 F.3d at 726. More than three years have passed since that time and Tito's business has changed in the following ways:

- Before, Tito hired recycling employees to perform sorting services at a Derwood facility pursuant to a contract with Maryland Environmental Services ("MES"). Tito employed approximately 25 employees in this capacity. In or around June/July 2016, the contract with MES expired and Tito was not awarded the new contract. Accordingly, Tito no longer provides these services at the Derwood facility and its workforce has significantly decreased.¹
- The "labor" side of Tito's business has also changed dramatically. Tito is no longer the primary contractor to Arlington or Fairfax county, meaning that it no longer maintains crews at those locations and generally does not provide any services to those entities. In addition, Tito now relies more heavily on sub-contractors to perform work. It currently employs between 5-7 laborers, whereas before it employed at least 30 laborers. In addition, because Tito no longer maintains a fleet of trucks, it does not employ any mechanics (in 2013, Tito employed 2 mechanics who were part of the proposed bargaining unit).

¹ Tito continues to provide services at the transfer station at Derwood and it also continues to employ workers at the Dickerson and Cockeysville facilities. The terms and conditions of employment at these sites are governed by different contracts with MES and vary, as described in Tito's offer of proof. The total number of recycling employees has decreased from approximately 60 in 2013 to approximately 30 as of the end of April 2017.

The changes in Tito's workforce are not a function of attrition or turn-over; rather, its operations have changed significantly. The type of work it performs has changed – it no longer performs sorting services at Derwood and, as a result, approximately half of its recycling workforce is gone. Similarly, it does not provide services to Arlington or Fairfax county and it no longer maintains a large labor workforce, but instead relies more on subcontractors to meet its obligations. Overall, the total number of employees at Tito has decreased from around 100 in 2013 to approximately 50.

These changes to Tito's business would affect both the size of the proposed bargaining unit and also the scope and character of the unit. Moreover, the election results were relatively close (28 ballots in favor of the Union; 13 ballots against participation in the Union; and 13 challenged ballots that were not counted). For all of these reasons, it would be improper to issue a bargaining order or to modify the bargaining unit at this stage.

CONCLUSION

Based on the foregoing, Tito submits that the petition should be dismissed or remanded to the Regional Director for further proceedings.

March 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March 2017, I caused the foregoing to be served via regular mail on the counsel listed below:

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